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Competing ideas of the individual under the GDPR

The individual is central to the General Data Protection Regulation ("GDPR")[1] and the right to data protection.[2] The protection of the individual and their right to the protection of personal data is the primary goal of the GDPR.[3] In order to achieve this protection, the threshold of application of the GDPR is defined in terms of the individual through the concept of personal data.[4] Assessment of the legality of processing is closely tied to an assessment of the impact on an individual's interest.[5] The individual is armed with rights to protect their own interests against data controllers,[6] and to secure redress where their rights are infringed.[7] While we cannot say the GDPR is entirely individualistic,[8] the individual and their interest is central to the framing and operation of the regime.

In light of literature which critiques individualistic tendencies in data protection and informational privacy laws,[9] it is valuable to question – why is the individual central to the GDPR and the EU's data protection project? This paper seeks to address some of the historic, legal and conceptual factors which inform the central position of the individual in the GDPR, and the particular role and conception of the individual under the GDPR. This paper addresses two particular influences. First, the shaping role that diverse notions of privacy have had upon the GDPR is considered, and how power disparities which early privacy rights sought to safeguard become translated to questions of individual autonomy and fairness under the GDPR. Second, this paper considers the place of the GDPR within the wider European Union context—its centrality to both the European Union's economic order and its fundamental rights mission, and the tension between the two.

By tracing these influences upon the conception and role of the individual under the GDPR, this paper seeks to make explicit some of the implicit assumptions and choices underlying the framework. By uncovering these influences on the place of the individual within the GDPR, this paper contributes to the literature on EU data protection law by engaging with the ideological positions which have shaped the regime. By identifying these assumptions and

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[1] REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4/5/2016, p 1–88).
[2] Article 8, Charter of Fundamental Rights of the European Union ("Charter").
[3] Article 1, GDPR.
[4] Article 4(1), GDPR.
[5] Three legal pre-conditions explicitly invoke consideration of the individual: consent, necessity for the performance of a contract with the data subject, and necessity for the protection of the data subject's (or another natural person's) vital interests. Two of the pre-conditions are nominally publicly oriented (necessity for compliance with a legal obligation or necessity for a public interest task). Despite this public character, the impact upon an individual is still relevant to these grounds because any public legislative measure which interferes with the right to personal data is subject to review under Article 8 of the Charter. See section 3.2 below.
[6] Articles 15, 16, 17, 18, 20, 21, 22, GDPR.
[7] Articles 77-79, GDPR.
[8] E.g. some of the data protection principles, the principles of data protection by design and default are less individually oriented.
[9] E.g. Woodrow Hartzog, 'Opinions · The Case Against Idealising Control' (2018) 4 European Data Protection Law Review 423; Julie E Cohen, 'Turning Privacy Inside Out' (2019) 20 Theoretical Inquiries in Law 1; Orla Lynskey, 'Delivering Data Protection: The Next Chapter' (2020) 21 German Law Journal 80; Elettra Bietti, 'The Discourse of Control and Consent over Data in EU Data Protection Law and Beyond' [2020] Hoover Institution Aegis Paper Series 16.

choices, we can question them, and engage critically with the capacity of the GDPR to meet its objectives and to address structural and systemic data abuses.

1. Privacy and data protection

The notion of privacy is contentious and unsettled. The ambiguity of its meaning has inspired many conceptualisations and taxonomies.[10] Legally, it has expansive scope, protecting a wide range of interests (from one's sexuality and reproductive rights to protection against police surveillance.) The history of privacy is also the history of data protection, and its conception and legal protection has considerable influence on the EU data protection project. By examining the emergence of privacy as an interest connected with individuality and protected by an individual right, we learn how the individual orientation of informational privacy has contributed to the conceptualisation and legal form of the individual within data protection.[11]

1.1. Foundational ideas of privacy

The legal protection of privacy and private life began in a variety of Western jurisdictions in the late 18th and early 19th Century. Perhaps the best-known early formulation of privacy is found in the article of Warren and Brandeis in 1890, *The Right to Privacy,* in which the authors advocated for a "right to be let alone".[12] In this article, we can see the influence of earlier emerging notions of privacy in Europe. As Richardson recognises, the article built upon "seeds" in earlier English and European continental developments.[13]

(a) Privacy, liberty, and rights

In writings of 18th and 19th century theorists we can see the beginnings of the current privacy regime. Before privacy as a standalone interest or right was protected, the concept of the private domain formed part of liberal thinking. The issue tended to emerge through consideration of the proper role of the state in public and private domains.[14] As Berg writes, the private domain forms part of works of John Stuart Mill and Jeremy Bentham, though at times it is implicit rather than express.[15] These early formulations concerned a private space or domain which allowed for shelter from the scrutiny of the state.[16] Distinct from the public sphere—the proper arena of government and politics—the private sphere offered individuals a space to act freely. While these early liberal theorists did not engage directly with a right to privacy, the earliest privacy rights in constitutional traditions in Europe did accord with similar conceptions of individual rights and individual liberty within the private domain.

The notion of privacy as protecting against state interference with the individual's private domain was adopted in the form of constitutional protections in some European states

[10] E.g. Ferdinand David Schoeman, 'The Meaning and Scope of Privacy', *Privacy and Social Freedom* (Cambridge University Press 1992); Daniel J Solove, 'Conceptualizing Privacy' (2002) 90 California Law Review 1087; Daniel J Solove, *Understanding Privacy* (Harvard University Press 2008); Adam Moore, 'Defining Privacy' (2008) 39 Journal of Social Philosophy 411.
[11] A number of jurisdictions, in particular, French, English and German speaking nations are considered, chosen due to limitations of scope and because of the influence that these states had upon the supranational European approaches, including the GDPR.
[12] Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193.
[13] Megan Richardson, *The Right to Privacy: Origins and Influence of a Nineteenth-Century Idea* (Cambridge University Press 2017).
[14] Chris Berg, *The Classical Liberal Case for Privacy in a World of Surveillance and Technological Change* (Springer Nature Switzerland AG 2018) 28.
[15] ibid 24–25.
[16] ibid 25.

beginning in the 19th century.[17] The Belgian constitution of 1831 restricted searches in homes and privacy of correspondence.[18] A variety of German efforts, as Snyder describes, sought to extend privacy rights from the 1830s.[19] Privacy rights were included in the Constitutional Charter of the Electorate of Hesse in 1831 and the Frankfurt Constitution of 1849 which sought to restrain the state from entering and searching homes and from confiscating letters.[20]

Into the 20th century, privacy rights became more commonplace in national constitutions, though certainly not universal.[21] Most commonly these take the form of protections of the home and communications secrecy. Both are protected in the Italian Constitution of 1947[22] and the Constitution of Denmark of 1953[23]. The German Basic Law adopted in 1949 guaranteed the privacy of correspondence only.[24] The Spanish Constitution of 1974 guarantees "[t]he right to honour, to personal and family privacy and to one's own image", as well as safeguarding the inviolability of the home and of communications.[25]

Supranational protections of privacy also developed in the 20th century, the Universal Declaration of Human Rights and the European Convention of Human Rights would both contain privacy rights.[26] Article 8 of the ECHR, which has significant impact on the EU data protection regime, formulated its protection as one's right to "respect for his private and family life, his home and his correspondence."

The constitutional and supranational privacy rights adopted sit within a liberal rights context, wherein rights are connected to the powers and duties of the state, and idea of an individual's liberty from state power within a private domain. Thus, some of the earliest approaches to privacy in Europe were conceived in the context of theorising and constitutionalising the relationship between the individual and the state, with national and regional differences in the formulation of that relationship.

(b) Private life, dignity and the press

Dignitarian traditions of privacy and private life were also emerging in the 18th and 19th centuries. For example, the French Declaration of the Rights of Man of 1789 contributed to an idea of human dignity founded on equality of all and sought to achieve such equality through the a constitutional framework to secure these declared rights for its citizens.[27] At the same time, the French notion of *"la vie privée"* (private life) was emerging.[28] The idea of a private life which should be protected from the 'insult' of press freedom was defended in the 18th and 19th

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[17] See Thomas J Snyder, 'Developing Privacy Rights in Nineteenth-Century Germany: A Choice between Dignity and Liberty?' (2018) 58 American Journal of Legal History 188.
[18] Articles 10, 22. Belgium's Constitution of 1831.
[19] Snyder (n 17).
[20] ibid 193, 204–205.
[21] The Austrian federal constitution does not protect privacy, though in 2000 data protection was added. Datenschutzgesetz 2000. The Irish Constitution does not protect privacy, though the right was judicially recognised as an unenumerated personal constitutional right. *Kennedy v Attorney General* [1987] IR 587. The French Constitution of 1958 does not protect privacy, this protection is in the Civil Code. Article 9, French Civil Code.
[22] The Constitution of the Italian Republic ss 14–15.
[23] Constitution of Denmark 1953 s 72.
[24] Article 10, German Basic Law.
[25] Section 18, Spanish Constitution.
[26] Article 12, UDHR. Article 8, ECHR.
[27] Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury Publishing Plc 2015) 41–42.
[28] Wenceslas J Wagner, 'The Development of the Theory of the Right to Privacy in France' [1971] Washington University Law Review 28.

centuries (both rhetorically and, occasionally, by duel) but primarily associated with the upper classes.[29] In France, the first constitutional protection of privacy sought to extend this idea to all, as the French Constitution of 1791 acknowledged 'calumnies and injuries' against acts of a person's private life as an exception to protections of press freedoms.[30] Whitman names this part of "a theatre of a *levelling up,* of an extension of historically high status norms throughout the population."[31]

In parallel, as Schwartz and Peifer note, the rights of dignity and personality were to play important roles in the development of Germany privacy protections,[32] as in German speaking nations, concepts of personality were emerging in philosophical discourse,[33] alongside the desire to accord the ordinary person the same legal treatment as nobles and other privileged members of society.[34]

Advances in photography and high-circulation media drew criticism as intrusions into private life, leading to early judgments. As Warren and Brandeis complained of the invasion of the "sacred precincts of private and domestic life",[35] many European courts were entreated to restrain such invasions, often by celebrities.[36] From a small sample, a variety of legal approaches to protect private life are seen. In England, *Prince Albert v Strange* concerned the copying and propose exhibition of etchings made by the Prince and Queen Victoria.[37] The Prince is successful, for the etchings were "subjects of private and domestic interest",[38] and given "privacy is the right invaded" an immediate injunction is warranted.[39] In France, the publication of a photograph of author Alexandre Dumas in his shirt sleeves with a young actress was restrained: the alienation of *la vie privée* required a formal agreement, which was absent.[40] By contrast, in Germany, personality rights were slower to extend to such occurrences, as Schwarz and Pfeifer note the finding of the Reichsgericht that there was no personality right violation by publication of letters written by Wagner.[41]

Thus, another tradition of privacy emerges from dignitarian origins, and ideas of a state's duty to protect its citizens equally. The legacy of such ideas persists in supranational privacy law. It has contributed to national legislative regimes which in turn shaped the EU data protection regime,[42] though there is an ongoing scholarly debate on the proper conceptual place of dignity in EU data protection law.[43]

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[29] James Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' The Yale Law Journal 1153, 1173–1174. See also Wagner (n 28).
[30] Chapter V, Article 17, Constitution de 1791. Whitman (n 29) 1172.
[31] Whitman (n 29) 1166.
[32] Paul M Schwartz and Karl-Nikolaus Peifer, 'Transatlantic Data Privacy Law' (2017) 106 Georgetown Law Journal 65, 123. Whitman points to German personality rights and dignitarian justifications of legal protections as contributing to a dignitarian culture of privacy in Europe. Whitman (n 29) 1173.
[33] Whitman (n 29) 1181–1186; Richardson (n 13) 7–8.
[34] Snyder (n 17) 197–198.
[35] Warren and Brandeis (n 12) 195.
[36] See Richardson (n 13).
[37] *Prince Albert v Strange* (1849) 1 Mac & G(25) 1171
[38] Id 1172.
[39] Id 1179
[40] *Dumas c Liébert (1867)* cited and translated by Richardson (n 13) 67, 149.
[41] Paul M Schwartz and Karl-Nikolaus Peifer, 'Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?' (2010) 98 California Law Review 64, 1948.
[42] In particular, the German approach to data protection. See Schwartz and Peifer (n 41); Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015) 94–95.
[43] See Lynskey, *The Foundations of EU Data Protection Law* (n 42) 95–106; Luciano Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 Philosophy & Technology 307; Anne de

1.2. Privacy rights and data protection law

While a complete history of the origins of the right to privacy is beyond the scope of this paper, this brief examination illustrates some noteworthy observations.

First, privacy conceptions have been diverse from their origins. Different national traditions contributed to differing notions of privacy and protective approaches. Early constitutional approaches focussed on the home and correspondence, and judicial cases looked to intrusions of the press the domestic and intimate. When the EU adopts its data protection regime in furtherance of privacy interests, it will inherit these conceptions, but as discussed below, the grafting of these diverse ideas into an omnibus regime leads to a somewhat fragmentary EU approach.

Second, from the outset, privacy has been concerned with the individual. Sometimes, with rights-based approaches founded on liberty, it has represented an understanding of the relationship of the individual to the state: a domain where individuals might find shelter from state interference. In some cases, this has translated to an emphasis on protection of the homes, or their domestic or intimate spheres of life.[44] In other traditions, it has represented a notion of the duty of the state to uphold the dignity of the all individuals. As González Fuster has written, this dignitarian perspective has also contributed to an understanding of privacy linked to individual self-determination,[45] a concept which has strongly influenced the GDPR. Moreover, the idea of privacy as an individual interest is likely to have influenced the framing of data protection legislation in terms of individual interests.

As we shall see, these approaches to and conceptions of privacy and of the individual have been inherited by and shaped the EU data protection regime, due to the ties between the right of privacy and the data protection project. At this point, I depart from the general history of notions to privacy, to focus on the development of informational privacy and data protection.

2. From privacy to data protection

Informational privacy and data protection developed in the mid-twentieth century. As Erdos describes, after the second world war, when most European constitutions contained some privacy protection,[46] comprehensive regulatory frameworks constraining information did not yet exist.[47] Much as photography and telephone technologies had shaped early laws and conceptions of privacy, in the 1960-1970s, new computing technologies inspired modern informational privacy and data protection.

2.1. The birth of privacy regulation

Two early influential works demonstrated disparate understandings of privacy and desirable approaches to privacy law, but agreed on the need for strengthened privacy laws due to

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Hingh, 'Some Reflections on Dignity as an Alternative Legal Concept in Data Protection Regulation' (2018) 19 German Law Journal 1269.

[44] Arguably, the legacy of such thinking in seen in the inclusion of an exemption from regulation for purely personal and household activities. Damien Chalmers has suggested that this exemption reflects a notion of the private sphere. Damien Chalmers, 'Informational Self-Determination, EU Law and Informational Capitalism' (Centre for European Legal Studies Webinar, 27 January 2021) <https://www.youtube.com/watch?v=_TaFB78yt7A> accessed 16 February 2021.

[45] Gloria González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU*, vol 16 (Springer International Publishing 2014) 23.

[46] In variable forms, often later subsumed into an umbrella right of privacy. ibid 24.

[47] David Erdos, *European Data Protection Regulation, Journalism, and Traditional Publishers: Balancing on a Tightrope?* (Oxford University Press 2019) 36.

technological developments.[48] Westin's foundational work, *Privacy and Freedom*,[49] though situated in the US, resonates with European approaches.[50] His approach is rooted in self-determination, defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[51] Westin suggests that privacy allows individuals to self-realise,[52] to allow individuals to determine the appropriate amount of privacy to serve their needs.[53] Moreover, as González Fuster recognises, by placing *information* at the core of his work, Westin was foundational in the birth of 'informational privacy' as a distinct concept.[54] Bloustein's position, though less cited today, presented an alternative vision of privacy, rooted in human dignity.[55] An intrusion of privacy, Bloustein writes, may threaten liberty, but "[t]he injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered."[56] Both conceptions pervade today, and both are notable for pointing to the social value[57] and group perspectives[58] of privacy, perspectives which have only more recently re-emerged.

In Europe, supranational organisations, responding to these same technological advances, began to call for strengthened protections. In 1968, the Parliamentary Assembly of the Council of Europe recommended a study on whether member state laws adequately protected the right of privacy in light of new scientific and technical methods.[59] Throughout the 1970s, both the Council of Europe and the European Community began calling for legal reform and work on determining appropriate legal protections, with the European Community noting that "[i]t would be better for the Community to seek a genuine political consensus on this matter now with a view to establishing common ground rules, than be obliged to harmonise conflicting

[48] Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University Law Review 962, 963. Alan F Westin, *Privacy and Freedom* (2018th edn, Ig Publishing 1967) 66.
[49] Westin (n 48).
[50] The cross-pollination of ideas between the US and Europe is evident from parallel approaches in the US Fair Information Practice Principles and later European approaches. 'Records, Computers and the Rights of Citizens' (US Department of Health and Human Services 1973) <https://aspe.hhs.gov/report/records-computers-and-rights-citizens> accessed 16 February 2021. See Schwartz and Peifer (n 32); González Fuster (n 45) 37.
[51] Westin (n 48) 24.
[52] ibid 44.
[53] ibid 45.
[54] González Fuster (n 45) 31.
[55] Bloustein (n 48).
[56] ibid 1003.
[57] ibid 1005.
[58] Westin (n 48) 36.
[59] 'Human Rights and Modern Scientific and Technological Developments' (Council of Europe 1968) ssembly Debate on 31st January 1968 (16th Sitting) Recommendation 509 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=14546&lang=en> accessed 8 February 2021.

national legislation later on.[60] And indeed, many European states began adopting data protection legislation from the 1970s.[61]

Two key instruments derive from the 1980s and 1990s. After a series of resolutions which considered Article 8 ECHR insufficient to protect against computing technologies impact on informational privacy,[62] in 1981, the Council of Europe adopted the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ("Convention 108"),[63] effective in 1985. The Convention is framed by a desire to extend rights protections "in particular the right to the respect for privacy" while also committing to freedom of information.[64] In the Convention, key elements of the GDPR are found: the threshold concept of personal data, defined in terms of the individual data subject; the data protection principles; data subject rights; rules regarding special categories of data, data security and data transfers across borders.[65]

The 1995 Data Protection Directive,[66] builds upon Convention 108, drawing upon national traditions to further articulate the duties of data controllers, rights of data subjects and enforcement methods. The Data Protection Directive is framed as an instrument to serve two objectives: the free transfer of personal data within the EU and to protect "the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."[67] Notably, *privacy* of personal data was still framed as a central objective. By contrast, in the GDPR, a desire to shape an autonomous identity for data protection has led to a murky relationship between privacy and data protection. In disentangling data protection from privacy, individual control of data will come to the fore.

2.2. Control theories of informational privacy and influence upon data protection

Where privacy might be over-theorised at an abstracted level, in data protection a different phenomenon is seen—the intricacies of a complex legislative regime take unusual primacy in the conception of the right to data protection. As Erdos recognises, data protection is distinct from traditional liberal rights: from the outset "primarily articulated as a detailed regulatory

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[60] 'Community Policy on Data Processing' (Commission of the European Communications 1973) Communication of the Commission to the Council SEC(73) 4300 final 13 <http://aei.pitt.edu/6337/1/6337.pdf> accessed 8 February 2021; 'Protection of the Privacy of Individuals Vis-a-Vis Electronic Data Banks in the Public Sector' (Committee of Ministers of the Council of Europe 1974) Resolution (74) 29 <https://resources.law.cam.ac.uk/cipil/travaux/1974%20-%20Resolution%2074(29)%20on%20Privacy%20EDB%20&%20Public%20Sector.pdf> accessed 12 February 2021; 'Resolution on the Protection of the Rights of the Individual in the Face of Technical Developments in Data Processing' (European Parliament 1979) OJ C 140/34 <https://resources.law.cam.ac.uk/cipil/travaux/data_protection/1979%20-%20European%20Parliament%20Resolution%20on%20DP.pdf> accessed 12 February 2021.

[61] In 1973, Swedish Data Act. In 1978, the Austrian Data Protection Act. the Danish Public Authorities' Registers Act; the French Act No. 78-17 on data processing, data files and freedoms; the Norwegian Act relating to personal data registers. In 1979, the Luxembourgish Nominal Data (Automatic Processing Act).

[62] See González Fuster (n 45) 83–86.

[63] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1981.

[64] Preamble, Convention 108.

[65] Article 2(a), Article 5, Article 8, Articles 6, 7, 12, Convention 108.

[66] DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23/11/1995, p 31–50).

[67] Article 1, Data Protection Directive.

code".[68] Its status as a fundamental right in the EU came later, in 2007,[69] fifteen years after the Data Protection Directive was drafted and five years after complementary electronic communications privacy legislation.[70] As Lynskey writes, the EU failed to explain the content of the right to data protection,[71] and accordingly, the legislative form has been influential in the theorisation of the right, rather than vice-versa.

(a) Disentangling data protection and privacy

While the historic connection between privacy and data protection is evident, once the right to data protection gains standalone status under the Article 8 of the Charter, considerable disagreement exists as to relationship between two, both legally and conceptually. After the creation of the standalone right to data protection, all mentions of privacy are excised from the GDPR.[72] Further, the Court of Justice tends to consider the two rights together, and Lynskey and González Fuster both observe, in doing so usually conflates the rights.[73]

Scholars have sought to reconcile the rights, with differing results. Some writers have taken a formal legal approach, and by comparing privacy under the ECHR with EU data protection. Differences in scope are seen; data protection is broader in applying to more types of information (without an interference with one's private life necessary).[74] While this identifies a difference in their application, it does not resolve the conceptual relationship between the two rights, nor of the nature of the right to data protection.

When it comes to discerning the nature of the right to data protection, without clear signals from the EU drafters or the CJEU, scholars tend to resort to inference. Gellert and Gutwirth suggest the right to data protection should be understood by reference to the processing conditions within the legislative regime, and 'fair processing' principles.[75] Kokott and Sobotta look to the text of Article 8 of the Charter itself to emphasise that personal data must be processed *fairly* and in accordance with a legal basis.[76] Lynskey also draws on the legislative order to inform her conception of the right to data protection, observing that while the rights to privacy and data protection overlap, the right to data protection offers greater individual control rights over more types of information,[77] and she links this instrumental role to a normative justification for control based approaches linked to individual data harms.[78] By contrast, Purtova argues that data protection's conception derives from privacy, writing that that the

[68] Erdos (n 47) 35.
[69] Article 8, EU Charter.
[70] DIRECTIVE 2002/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31/7/2002, p 37–47).
[71] Orla Lynskey, 'Deconstructing Data Protection: The "Added-Value" Of A Right To Data Protection In The EU Legal Order' (2014) 63 International and Comparative Law Quarterly 569, 572.
[72] Whereas the Data Protection Directive makes many mentions of the right to privacy, in the GDPR all references have been erased and replaced with references to data protection.
[73] Lynskey, 'Deconstructing Data Protection' (n 71) 573–581; Gloria González Fuster, 'Fighting For Your Right to What Exactly - The Convoluted Case Law of the EU Court of Justice on Privacy and/Or Personal Data Protection' (2014) 2 Birbeck Law Review 263.
[74] Raphaël Gellert and Serge Gutwirth, 'The Legal Construction of Privacy and Data Protection' (2013) 29 Computer Law & Security Review 522; J Kokott and C Sobotta, 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) 3 International Data Privacy Law 222; Lynskey, 'Deconstructing Data Protection' (n 71).
[75] Gellert and Gutwirth (n 74) 525.
[76] Kokott and Sobotta (n 74).
[77] Lynskey, 'Deconstructing Data Protection' (n 71).
[78] Lynskey, *The Foundations of EU Data Protection Law* (n 42) ch 6.

right to data protection "lacks clarity as to its content and own normative weight needed in order to function as a benchmark…", thus "[i]f privacy and related autonomy and informational self-determination are not the rationale of the right to data protection … then what is?"[79]

(b) Control narratives of data protection

The dominant conceptual articulation of the right to data protection, and the purpose of data protection law, is that it intends to grant an individual control over their personal data. While this idea of data protection as the right to control one's personal data has some basis in the legislative framework, and its roots in German approaches to data protection, its dominance is less straightforward than it might appear.

The principle of informational self-determination was cemented in German constitutional law in 1983, and is a legacy of the German dignitarian conception of the personality right.[80] Efforts to explicitly adopt this principle into EU data protection law at the legislative drafting stage failed. As Purtova has described, attempts to normatively anchor the Data Protection Directive explicitly in informational self-determination fell short, though the influence of German data protection laws which were so rooted pervaded.[81] Notably, we can see the legacy of this principle in the procedural protections put in place to protect individual choices regarding data.

The Data Protection Directive did not make reference to the idea of control, but rather commentators pointed to the nature of the data rights granted to individuals,[82] certain data principles[83] and the central role of consent.[84] Curiously, as the GDPR simultaneously resiles from aspects of individual control,[85] it also introduces the concept of control over one's data explicitly for the first time.[86] But notably, the GDPR never defines control over personal data as the primary objective or the core of data protection.

Lynskey's articulation of individual control over personal data interprets the legislative grant of data rights through a normative lens, as set out in the previous section. Her approach is mirrored by many. We see Purtova refer to privacy and informational self-determination the "normative anchors" of the Data Protection Directive."[87] She suggests breaking the link between privacy and data protection "would amount to breaking the normative connection between data protection and informational self-determination."[88] Ausloos argues that control

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[79] Nadezhda Purtova, 'Default Entitlements in Personal Data in the Proposed Regulation: Informational Self-Determination off the Table … and Back on Again?' (2014) 30 Computer Law & Security Review 6, 11.
[80] Gerrit Hornung and Christoph Schnabel, 'Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-Determination' (2009) 25 Computer Law & Security Review 84.
[81] Purtova (n 79) 7.
[82] Damian Clifford and Jef Ausloos, 'Data Protection and the Role of Fairness' (2018) 37 Yearbook of European Law 130; Lynskey, 'Delivering Data Protection' (n 9).
[83] Purtova points to purpose limitation in particular, as "rooted in the values of informational self-determination and individual control". Purtova (n 79) 14.
[84] Bietti points to the inclusion of consent in Article 8 of the Charter to argue that "the right to have control over one's personal data is implied in the right to protection of personal data" Bietti (n 9) 2.
[85] See Article 7, GDPR, which limits the use of consent to justify processing. The introduction of the accountability principle also seemingly indicates a desire to shift responsibility to controller compliance.
[86] Recital 7, GDPR: "Natural persons should have control of their own personal data." See also, Recital 75, referring to of loss of control over personal data as a risk to rights and freedoms of natural persons against which data controllers are to guard; and Recital 68.
[87] Purtova (n 79) 9, 18.
[88] ibid 9.

over one's personal data is 'the essence' of the right to data protection,[89] though this seems to be a normative claim rather than a doctrinal one.[90]

Even those who criticise individual control usually take it as the starting point. For example, Bernal advocates for informational privacy grounded in autonomy and collaborative consent, while critical of prevalent consent practices and consent under the Data Protection Directive.[91] Further, Bietti points to EU data protection "grounded in the normative intersection of control, consent, and choice" while advocating for a move away from individual control over data.[92] Koops argues that the focus upon individual control of information has been said to deny the reality of modern data processing.[93] For Woodrow Hartzog, "an empire of data protection has been built around the crumbling edifice of control."[94]

As this literature alludes to, there are challenges with a conceptualisation of a right or legislative regime around a notion of individual control when that element of control is implicit rather than explicit in the regime. As Lynskey has pointed out, there is "no single 'principle of control' in EU data protection legislation."[95] There have been few attempts to articulate what control of one's data might mean beyond the exercise of the particular rights and consent. Ausloos proposes control as "a fluid concept", with a positive and negative dimension—an individual must be able to manifest their choices over data use and at the same time should be protected from their autonomy being subverted.[96]

Others have rooted ideas of self-determination in theories of autonomy. Rouvroy and Poullet advocate for a virtue ethics informed vision of respecting autonomy: to allow individuals to develop capacities for deliberative autonomy and for collective deliberative autonomy, and to live a self-determined life.[97] Kosta builds on this analysis to ground her normative conception of consent as 'an act of autonomy'.[98]

Setting aside for now the merits of individual control based approaches to data protection, at this point, I suggest that the understanding of data protection as individual control over data is constructed and not inevitable. As Purtova has written, whether individual control over data should be the defining normative choice underlying data protection was a choice that the EU legislature were facing upon the adoption of the GDPR.[99] While Purtova was characterising this as a choice between individual control based approaches and the entitlement of data

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[89] Jeff Ausloos, *The Right to Erasure in EU Data Protection Law: From Individual Rights to Effective Protection* (Oxford University Press 2020) 61.
[90] Scholarship on the essence of Article 8 suggest the essence has not yet manifested as a coherent concept. Maja Brkan, 'The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning' (2019) 20 German Law Journal 864; Maria Grazia Porcedda, 'On Boundaries -Finding the Essence of the Right to the Protection of Personal Data' in Ronald Leenes and others (eds), *Data Protection and Privacy: The Internet of Bodies* (Hart Publishing 2019).
[91] Paul Bernal, *Internet Privacy Rights: Rights to Protect Autonomy* (Cambridge University Press 2014) ch 2.
[92] Bietti (n 9) 4.
[93] Bert-Jaap Koops, 'The Trouble with European Data Protection Law' (2014) 4 International Data Privacy Law 250, 251.
[94] Hartzog (n 9) 425.
[95] Lynskey, *The Foundations of EU Data Protection Law* (n 42) 180.
[96] Ausloos (n 89) 64.
[97] Antoinette Rouvroy and Yves Poullet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer Netherlands 2009) 14.
[98] Eleni Kosta, *Consent in European Data Protection Law* (Brill 2013) 140.
[99] Purtova (n 79).

processors to use data, we can extend her point. While Article 8 of the Charter prescribes that the EU protect the right to data protection, it does not prescribe how such data protection should be conceived beyond a legislative basis, the right to access and supervisory authorities. We can look to deeper accounts of autonomy, such as Rouvroy and Poullet's vision, to examine how data protection can contribute to individual autonomy, rather than taking for granted that individual control over data choices serve those ends.

2.3. From state power and duty to individual autonomy and fairness

If we contrast these conceptions of the right to data protection to that of its legal and conceptual parent—privacy—an interesting phenomenon is observed.

The right to privacy emerged in parallel traditions, concerned with the right to liberty from the coercive power of the state, and the duty of the state to protect from invasions into one's domestic and intimate sphere. The early liberal rights order in which privacy was incubated was concerned with power imbalances: the coercive power of the state and the state's duty to intervene to constrain invasive new technologies.

Modern concerns about state and organisational surveillance are not so different. Yet under the GDPR, the debate is framed differently. Discussions of power are largely absent,[100] and instead interests are "balanced", through the language of fairness, individual self-determination and in public contexts, proportionality. Questions of power have been silenced as they were subsumed into a governance framework premised upon a liberal rights regime.

Yet, traditional liberal rights frameworks are critiqued from many angles—as Graziadei has written—their illusory nature to the disenfranchised and marginalised, for their idealised models, and the failure of the language of individual rights to capture the social.[101] When we recognise that the discussion has been framed by a 19th century vision of legal solutions to privacy issues, we can also examine how alternative responses to these liberal framings can illuminate our responses to the challenges we face.[102]

Of course, the GDPR grew out of liberal ideas of privacy, but it does so in a particular supranational context. Therefore, to more fully grasp the ideas which underpin the GDPR, we cannot ignore the relevance of the EU's political and institutional character.

3. The EU and the individual in data protection law

While the previous section has argued that the GDPR has many historical antecedents which shaped its evolution, at the same time, the EU context of the data protection project has been determinative.[103] Inspired by the suggestion that the individual's conception in EU law cannot

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[100] A number of scholars have advocated for inclusion of such power dynamics. See e.g. Orla Lynskey, 'Grappling with "Data Power": Normative Nudges from Data Protection and Privacy' (2019) 20 Theoretical Inquiries in Law 189; Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019).

[101] Michele Graziadei, 'Rights in the European Landscape: A Historical and Comparative Profile' in Sacha Prechal and Bert van Roermund, *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008) 86–87.

[102] See a similar argument in Julie Cohen, 'Studying Law Studying Surveillance' (2014) 13 Surveillance & Society 91.

[103] Lynskey has argued for the need to place the GDPR and data protection law more broadly within its EU context. See e.g. Lynskey, *The Foundations of EU Data Protection Law* (n 42); Orla Lynskey, 'The "Europeanisation" of Data Protection Law' (2017) 19 Cambridge Yearbook of European Legal Studies 252; Orla Lynskey, 'Extraterritorial Impact in Data Protection Law through an EU Law Lens' in Federico Fabbrini, Eduardo Celeste and John Quinn (eds), *Data Protection Beyond Borders: Transatlantic*

be separated from the institutional context which informs that conception,[104] this section explores how the EU context shapes the role and conception of the individual within the GDPR. I argue that the institutional, political and legal order of the EU has strongly shaped the GDPR, and has contributed to a fragmentary vision of the individual within the GDPR. I suggest that there are competing ideas of the individual within the GDPR, and explore one particular tension: the contrasting implications of conceiving of the individual as a rights-holder within the EU project, and the individual as a consumer in the EU single market.

3.1. The EU and the individual

There are many reasons why the EU context is relevant to an analysis of the role and conception of the individual within the GDPR. The first is simple: the GDPR is an EU legislative act. The Data Protection Directive was adopted as a market harmonising measure. Persistent variation due to national variations in transposition was put forward as one of the justifications for adopting a European Regulation to replace the Directive, the GDPR.[105] For this reason, Lynskey suggests that the GDPR would lead to the 'Europeanisation' of data protection law, in the establishment of a centralised EU approach.[106] While the GDPR, in name a Regulation, still allows for Member State variation and implementation in a number of areas, it has narrowed divergence.

Moreover, the CJEU has taken on an increasingly significant role in the interpretation of data protection law since the adoption of the Charter in 2007. The individual is said to be at the heart of the European Union project[107] and the adoption of a right to data protection has had a significant impact in the case law of the CJEU.

Data protection has also become connected to the external political activities of the EU, as trade agreement negotiations incorporate assessments of third country data protection regimes in order to facilitate data transfers. This has resulted in many countries adopting legislative regimes which are informed by EU standards,[108] sometimes called the 'Brussels Effect'.[109]

By situating the understanding of the subject in its EU context, a deeper understanding of the notional individual within the regime is possible. In the case of the GDPR, this allows us to understand how the place of the individual within the EU project has shaped the design and operation of the GDPR, and the particular role that the individual plays within the GDPR. In earlier works on the notion of the individual in the EU, two important aspects of this context inform the GDPR.

Perspectives on Extraterritoriality and Sovereignty (Hart Publishing 2021) <https://www.ssrn.com/abstract=3674413> accessed 29 October 2020.

[104] Loïc Azoulai, Etienne Pataut and Ségolène Barbou des Places, 'Being a Person in the European Union' in Loïc Azoulai, Etienne Pataut and Ségolène Barbou des Places (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016) 4.

[105] Recital 13, GDPR.

[106] Lynskey, 'The "Europeanisation" of Data Protection Law' (n 103).

[107] Preamble, Charter.

[108] Greenleaf has traced the influence of European data protection standards globally. Graham Greenleaf, 'The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108?' (2012) 12 University of Edinburgh Research Paper Series 36; Graham Greenleaf, '"European" Data Privacy Standards Implemented in Laws Outside Europe' (2018) 18 University of New South Wales Law Research Series <https://ssrn.com/abstract=3096314> accessed 9 April 2019.

[109] Anu Bradford, 'The Brussels Effect' (2012) 107 Northwestern University Law Review 1.

First, the particular legal and political order of the European Union has shaped the role and conception of the individual within the EU legal order. The unique nature of the EU as a supranational project, with limited allocated competences and challenges of legitimacy, has led to placing of the individual at the centre of the European Union project.[110] Thus, the individual is placed in the middle of debates on the legitimacy of the EU.[111] The individual has also played an important operational role in realising the Union through the exercise of individual rights.[112]

But because of the piecemeal nature of the regulatory spaces in which the EU operates, a fragmented and sometimes contradictory conception of the individual within the EU arises. As Dani has argued; "individuals are often situated at the intersection of multiple governmental strategies with distinct and not necessarily coherent policy goals, rationales and ideologies."[113] EU law creates many classifications of individuals (worker, consumer, student etc.), and depending on the classification of the individual and "various regimes of individual action and different sets of rights" are created.[114] Further as Azoulai has written, "EU law is a conceptual world in which the individual's participation into pre-existing institutional contexts rooted within the Member States is key."[115] Thus, the individual is a worker in a workplace, a consumer in a marketplace, a member of a mobile family etc.[116] Accordingly, our understanding of the individual in EU law is deriving from multiple sites, as a set of supranational measures interact with national regimes, contexts and institutions. Unsurprisingly, therefore, how the worker, the consumer or the family member is understood in EU law differs. However, the data subject, due to the ubiquity of data processing,[117] is all of these. Therefore, multiple understandings of the individual across different categories are collapsed into a single classification when we consider the role of the individual as data subject under the GDPR.

Second, the EU project is premised upon the achievement of a particular socio-economic order.[118] The EU built a pluralist constitutional order, which premised upon "the idea that the EU includes a promise of justice different from, but as valuable as, the one that nation states can achieve."[119] The Charter endorses a conception of the human being imbued with moral value, vested with "dignity, self-determination, a capacity to enjoy rights and to hold values,

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[110] Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Personal in EU Law: Rights, Roles, and Identities* (Hart Publishing 2016); JHH Weiler, 'Van Gend En Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 International Journal of Constitutional Law 94; Susanna Lindroos-Hovinheimo, 'There Is No Europe-On Subjectivity and Community in the EU' (2017) 18 German Law Journal 19.

[111] Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (Oxford University Press 2008); Floris de Witte, 'Emancipation through Law?' in Loïc Azoulai, Etienne Pataut and Ségolène Barbou des Places (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016); Floris de Witte, 'Integrating the Subject: Narratives of Emancipation in Regionalism' (2019) 30 European Journal of International Law 257.

[112] Weiler has pointed to the importance of the doctrine of direct effect in constituting the EU, in part by harnessing individual interests in the vindication of rights. Weiler (n 110) 96. See also discussion of Azoulai et al on the individual as an agent of the EU. Azoulai, Pataut and Barbou des Places (n 104) 4.

[113] Marco Dani, 'The Subjectification of the Citizen in European Public Law' (2015) 02 EUI Working Papers 35, 2.

[114] Azoulai, Pataut and Barbou des Places (n 104) 5.

[115] Loïc Azoulai, 'The European Individual and Collective Entities' in Loïc Azoulai, Etienne Pataut and Ségolène Barbou des Places (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016) 204.

[116] Azoulai (n 115).

[117] Nadezhda Purtova, 'The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 Law, Innovation and Technology 40.

[118] See Azoulai, Pataut and Barbou des Places (n 104) 6.

[119] Lindroos-Hovinheimo (n 110) 1231.

and a corresponding sense of responsibility".[120] But alongside this Charter of rights, the economic origins and current economic objectives have defined the EU. As De Witte writes, EU economic integration "places the subject at the centre of the European project; while the objective is the need to constrain public (state) power, the main instrument to do so is the subject's economic freedom."[121] Thus, we see a constitutional order which is premised upon a particular economic model and mission, and individual rights become connected to this economic mission. The exercise of individual rights support the functioning of the EU internal market, and the building of a new socio-economic order.[122]

It is therefore unsurprising to see competition between economic and constitutional subjectivities in EU law.[123] I suggest we also see such competition in the GDPR. The GDPR, like its predecessor, seeks to combine a rights based regime with a particular economic mission,[124] and a vision of data as an economic asset. This duality contributes to a tension between the idea of the data subject as a rights holder and the economic vision of data processing and the status of the data subject as a market participant.[125]

3.2. The data subject as rights-holder, the data subject as consumer

The GDPR, although adopted solely on the basis of a legislative competence founded on the right to data protection,[126] continues to have a combined fundamental rights and economic orientation. The Regulation is intended to contribute to "economic and social progress", to both strengthened economies and to individual well-being.[127] The right to data protection is to be balanced with other rights and freedoms, including the freedom to conduct a business.[128] Technological developments should be harnessed through the free flow of data throughout the Union.[129] Compliance obligations are tailored to the needs of small and medium sized enterprises.[130]

In general, data subjects are considered in a homogeneous manner,[131] unless they are children. However, different ideas of the individual are embedded in the GDPR which mirror the dual economic and rights goals. As a generality, we can see a division between the notion of the individual as a market participant—a consumer—and the individual as a rights-holder. This distinction comes to the fore in the division between those elements of the GDPR which apply to state processing activities and those of the private sector.

If we look to the provisions of the GDPR which govern the legality of processing data by public authorities, the provisions reflect the language of fundamental rights. Data processing on the basis of a legal obligation or public interest must be provided for by law.[132] Such legal

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[120] Azoulai, Pataut and Barbou des Places (n 104) 4.
[121] de Witte (n 111) 264.
[122] Azoulai, Pataut and Barbou des Places (n 104) 5–6.
[123] Dani (n 113) 18.
[124] Article 1, GDPR. Orla Lynskey has written of these dual objectives under the Data Protection Directive. Lynskey, *The Foundations of EU Data Protection Law* (n 42) ch 3.
[125] Though it is beyond the scope of this paper, other conceptions of data subjects (including employees, and children) also emerge.
[126] Article 16, TFEU.
[127] Recital 2, GDPR.
[128] Recital 4, GDPR.
[129] Recital 6, GDPR.
[130] Recital 13, GDPR.
[131] Two exceptions are: Peter Blume, 'The Data Subject' (2015) 1 European Data Protection Law Review 258; Roxana Vatanparast, 'Designed to Serve Mankind? The Politics of the GDPR as a Global Standard and the Limits of Privacy' (2020) 80 Heidelberg Journal of International Law 819.
[132] Articles 6(1)(c) and (e), 6(3) GDPR.

measures can and have been challenged using Article 8 of the Charter.[133] Similarly, processing of special categories of personal data must accord with fundamental rights standards.[134] In the decisions of the CJEU, the fundamental rights to data protection and privacy have been powerful instruments for the review and invalidation of state measures, including; the Data Retention Directive,[135] two Commission adequacy decisions,[136] a proposed international data sharing agreement[137] and multiple national surveillance measures.[138] It is not surprising that a rights based approach would apply to state processing activities, after all, rights emerged first in Europe in the context of questions of law and liberty from state coercion.[139]

By contrast, the language of the GDPR when oriented towards the private sector is less rights-oriented, and more economic. Some have distinguished consumer law and data protection regimes as separate and of a different character,[140] but at EU level, data protection has always had an economic character.[141] There are many aspects of the GDPR which embody an idea of the individual as a consumer. Indeed, such complementarity has inspired some to suggest the role that consumer law enforcement may have in the data protection sphere.[142]

If we consider the governance of private sector processing, many of the GDPR's provisions adopt the language or strategies of economic ideas of data processing. We may point to three of the pre-conditions to lawful processing: consent, processing necessary for performance of a contract, and for the purposes of legitimate interests. Elements of consent requirements mirror a contractual vision of consent: with rules as to the presentation of consent in a written declaration,[143] or granted in the context of a contract,[144] and indications that box-ticking and internet settings are possible means of consent.[145] Special provisions are provided for the processing of children's data is in the context of information society services (by contrast to

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[133] C-398/15 *Manni* (9 March 2017) ECLI:EU:C:2017:197; C-73/16 *Puskar* (27 September 2017) ECLI:EU:C:2017:725.
[134] Article 9(2)(h), GDPR.
[135] DIRECTIVE 2006/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105/54, 13/4/2006, p54-63). Invalidated in C-293/12 and 594/12 *Digital Rights Ireland* (8 April 2014) ECLI:EU:C:2014:238.
[136] C-362/14 *Schrems v Data Protection Commissioner* (25 January 2018) ECLI:EU:C:2018:37*;* C-311/18 *Data Protection Commissioner v Facebook Ireland* (16 July 2020) ECLI:EU:C:2020:559.
[137] Opinion 1/15 *PNR* (26 July 2017) ECLI:EU:C:2017:592.
[138] C-203/15 and C-698/15 *Tele2* ECLI:EU:C:2016:970; C-511/18, 512/18 and 520/18 *La Quadrature du Net* (6 October 2020) ECLI:EU:C:2020:791; C-623/17 *Privacy International* (6 October 2020) ECLI:EU:C:2020:790.
[139] See section 1.1 above; Graziadei (n 101) 65.
[140] Natali Helberger, Frederik J Zuiderveen Borgesius and Agustin Reyna, 'The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law' (2017) 54 Common Market Law Review 1427; Peter Rott, 'Data Protection Law as Consumer Law – How Consumer Organisations Can Contribute to the Enforcement of Data Protection Law' (2017) 3 Journal of European Consumer and Market Law 113; Schwartz and Peifer (n 32) 119.
[141] The Data Protection Directive was adopted as a market harmonisation measure under the precursor to Article 114 TFEU.
[142] Rott (n 140); Helberger, Zuiderveen Borgesius and Reyna (n 140). Lynskey has also suggested that consumer law alongside competition enforcement could be a more holistic approach to data protection. Lynskey, *The Foundations of EU Data Protection Law* (n 42); Lynskey, 'Grappling with "Data Power"' (n 100).
[143] Article 7(2), GDPR.
[144] Article 7(4)
[145] Recital 32, GDPR.

other areas central to children's rights, such as schools, childcare or sports and recreation providers).[146] This is reinforced by the existence of exceptional approaches to consent in areas outside commercial processing: special rules for broad consents to scientific research[147] and the presumption against consenting to data processing by public authorities.[148] Processing on the basis of contractual necessity invokes a bargain struck between data subject and controller. Legitimate interests processing often also invokes economic considerations: an explicit mention of the data subject as client or contractor, and designating fraud prevention and direct marketing as potential legitimate interests.[149]

Transparency as core data principle[150] shares with consumer law "the pivotal role of information as a means to mitigate information asymmetries and to empower the individual."[151] Similarly, the right to data portability, applicable only to private sector processing,[152] demonstrates the shared idea of consumer choice as a mode of individual protection. We also see parallels in the enforcement mechanisms adopted in consumer law and data protection law, including the role of national supervisory authorities.[153]

That is not to say rights based conceptions are absent in the GDPR's application to private sector processing. The rights to data protection and privacy have shaped CJEU decisions concerning private sector processing. Perhaps the greatest innovation is the development of the right to be forgotten in *Google Spain*.[154] Otherwise, the primary impact of the rights based objective is seen in the expansive interpretative tendencies of the CJEU. In a series of cases, confronted with cross-border data processing, the CJEU expanded the territorial reach of EU data protection law, and the powers of data protection authorities. In *Google Spain,* the CJEU emphasised that the establishment requirement must be broadly to "ensur[e] effective and complete protection of the fundamental rights and freedoms of natural persons."[155] This line of reasoning is then followed in a series of subsequent cases on establishment.[156] This expansive tendency has also driven the interpretation of key threshold concepts, leading to a broader material application of EU data protection law, as the CJEU narrowed the exemption for household and purely personal processing,[157] while simultaneously expanding the concept of personal data[158] and who may be regarded as a controller.[159]

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[146] Article 8, GDPR.
[147] Recital 33, Article 89, GDPR.
[148] Recital 42, GDPR.
[149] Recital 47, GDPR.
[150] Article 5(1), GDPR and Articles 12-14, GDPR.
[151] Helberger, Zuiderveen Borgesius and Reyna (n 140) 1437.
[152] Article 20, GDPR.
[153] Notably, data protection actions have been included in the new consumer collective redress package. DIRECTIVE (EU) 2020/1828 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409/1, 4/12/2029, p 1–27).
[154] C-131/12 *Google Spain* (13 May 2014) ECLI:EU:C:2014:317.
[155] ibid par 53.
[156] C-230/14 *Weltimmo* (1 October 2015) ECLI:EU:C:2015:639*;* C-191/15 *Verein für Konsumenteninformation* (28 July 2016) ECLI:EU:C:2016:612*.* C-210/16 *Wirtschaftsakademie Schleswig-Holstein* (5 June 2018) ECLI:EU:C:2018:388*.*
[157] C-101/01 *Bodil Lindqvist* [2003] ECR I-12992; C-212/13 *Rynes* (11 December 2014) ECLI:EU:C:2014:2428*;* C-25/17 *Jehovan todistajat* (10 July 2018) ECLI:EU:C:2018:551.
[158] C-582/14 *Breyer* (19 October 2016) ECLI:EU:C:2016:779*;* C-434/16 *Nowak* (20 December 2014) ECLI:EU:C:2017:994*.* Note the interesting contrast to a narrower public sector interpretation in C-141/12 and 372/12 *YS and others* (17 July 2014) ECLI:EU:C:2014:2081*.*
[159] *Google Spain* (n 154)*; Wirtschaftsakademie Schleswig-Holstein* (n 156)*; Jehovan todistajat* (n *157*)*;* C-40/17 *Fashion ID* (29 July 2019) ECLI:EU:C:2019:629*.*

Therefore, to contrast the impact of the right to data protection in the private and public sectors, in the public sector, the right to data protection holds states to account by subjecting their data protection activities to a fundamental rights review (involving questions of necessity, proportionality and the essence of the rights), whereas in the private sector, the rights do not provide an additional layer of review, but rather simply inform the operation of the legislative scheme, based on an apparent assumption that broader application will lead to better data protection outcomes.

3.3. Addressing competing ideas of the data subject

Just as EU consumer law has been said to creates a 'fractured' subjectivity, where the consumer exists as "a bundle of partial identities",[160] there are multiple ideas of the data subject within the GDPR. I have suggested two of these understandings, which illustrate how our idea of the individual and the extent of their legal protection may be shaped by their relationship to the data controller: a rights-holding individual subjected to the powers and duties of a state, or a consumer of goods and services provided by a business. Although nominally all data processing within its scope is subject to a single regime—the GDPR—within that regime exist elements which are more relevant to different types of processing.

By acknowledging these multiple identities of the data subject, and mapping how the GDPR protections extend depending on these multiple identities, I suggest new lines of investigation are uncovered. First, simply by acknowledging these multiplicities, we can ask whether different types of situated individuals are well served by the GDPR. When surveillance affects individuals unequally,[161] we may ask whether a rights based framework acknowledges or can accommodate difference and marginalisation. We may question how a rights based approach should manifest in a horizontal relationship between private parties, and whether deference to an economic vision of private sector surveillance is appropriate. We can look to consumer law theory to inform data protection—such as our ideas of what 'fairness' in the data protection context may mean.[162]

4. Conclusion

By uncovering of the implicit ideas and assumptions which are informing the design and operation of the GDPR, we engage more critically with the framework. I have sought to do so on one central parameter of the GDPR: the role and conception of the individual.

The individual's role within the GDPR is a product of multiple factors, shaped over time through its relationship with privacy, ideas of informational self-determination and its place within the European Union project. Ideas of privacy emerged in diverse traditions, connected to questions of state power and individual liberty, notions of individual dignity and the state's duty to uphold the dignity of all. Concerns associated with modern computing technologies drove new generations of legislation premised on individual protection through data governance. The GDPR is a tapestry, with threads deriving from multiple nations, institutions and traditions. This patchwork nature causes challenges when we try to identify the nature of the right to data protection in isolation. The GDPR offers us only ground for inference and speculation. Normative arguments based on individual control have become prevalent, but I suggest by

[160] Marco Dani, 'Assembling the Fractured European Consumer' (2011) 29 LSE 'Europe in Question' Discussion Paper Series 4 <http://www.ssrn.com/abstract=1738474> accessed 1 December 2020.
[161] Michael McCahill and Rachel L Finn, *Surveillance, Capital and Resistance: Theorizing the Surveillance Subject* (Routledge 2015).
[162] See Clifford and Ausloos (n 82).

recognising that this position is a normative choice, and remembering the history by which that choice was made, we can re-engage with the notion of individual control of data.

By situating the GDPR and the place of the individual under the GDPR within the wider EU context, we see that the placing of the individual at the centre of the GDPR accords with broader EU strategies. By acknowledging the socio-economic order within which the GDPR was developed, we can situate concerns about informational capitalism and systemic data abuse and analyse the GDPR's contributions to such business practices and its capacity to respond to them.